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No. 84-594

In The

Supreme Court of the United States

October Term, 1984

ALVIN W. SMITH,

Petitioner,

vs.

HONEYWELL INC. and
HONEYWELL INFORMATION SYSTEMS INC.

Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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67 pp

QUESTIONS PRESENTED

1. Whether the District Court committed error in allowing the petitioner to proceed pro se.
2. Whether the District Court committed error due to remarks made in the presence of the jury.
3. Whether the District Court committed error in its instructions to the jury.
4. Whether the District Court Findings of Fact on the petitioner's Title VII claims was based on the evidence.
5. Whether the standards of proof required of the petitioner in proving his claims under Section 1981 of the Civil Rights Act of 1866 was in error.

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OPINIONS BELOW

The opinion of the United States District Court for Minnesota and that Court's opinion on petitioner's Motions for new trial, amended findings of fact, and judgment n.o.v. are unreported. Copies are included herein in the Appendix at pages 10a-26a, and 27a-42a. The opinion of the Court of Appeals is reported at 735 F2d 1067; its opinion on petitioner's Motion for rehearing and rehearing en banc is unreported. Copies are included in the Appendix at pages 3a-8a, and 9a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1984 (App. 3a-8a)[1] and Motion for Rehearing and Rehearing En Banc was denied on July 17, 1984 (App. 9a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. §1981:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended:

> "Sec. 703.(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[1]Citation to the Appendix herein.

STATEMENT OF THE CASE

This is an individual action claiming race discrimination in violation of Title VII of the Civil Act of 1964 and Section 1981 of the Civil Rights Act of 1866. The petitioner, Alvin Smith, a black male, (hereinafter "petitioner" or "Mr. Smith"), alleges that the respondents, Honeywell Inc. and Honeywell Information Systems Inc. (hereinafter "Honeywell" or "HIS"), intentionally discriminated against him on the basis of his race (black) in his initial hiring on July 7, 1977, in various conditions during his employment, and his termination on July 28, 1980.

After termination of proceedings before the U.S. Equal Employment Opportunity Commission on April 14, 1981, Mr. Smith filed his Complaint in the instant case on June 2, 1981, in the United States District Court of Minnesota. Therein he alleged a number of occurrences violated his rights under Title VII, and also asserted the same occurrences violated his rights under Section 1981. On October 14, 1982, in the course of pre-trial proceedings, the District Court's Magistrate recommended certain counts be dismissed.* On October 25, 1982, the petitioner consented to the substitution of himself as attorney pro se for his then attorney of record. On December 9, 1982 the Magistrate's recommendations were adopted and on December 15, 1982 the parties consented to trial before the Magistrate with direct appeal to the Court of Appeals. (App. 43a-47a.) In that the same facts were asserted for the petitioner's Title VII and Sec. 1981 claims, it was agreed that the case would be tried to the Court and jury simultaneously.

*The counts dismissed, as beyond the Court's pendent jurisdiction, were an allegation of false inducement in hiring under Minn. Stat. 181.64, an allegation of discriminatory employment practices under Minn. Stat. 363.01 *et seq.*, and an allegation of unlawful termination under Minn. Stat. 181.13 and 181.14.

Mr. Smith graduated from William Mitchell Law School in St. Paul, Minnesota, in January, 1981, but has not been admitted to practice before the bar. He was represented by counsel until he consented to the substitution of himself in a pro se capacity on October 25, 1982. Thereafter he has represented himself, but did employ an attorney to assist him at the actual trial. Mr. Smith did not object to these arrangements after October 25, 1982, or raise them as an issue for review in the Courts below prior to the instant Petition for a Writ of Certiorari.

An eight day trial was held between February 7 and February 17, 1983. During the trial, and at the close of evidence, both parties moved for dismissal and directed verdicts; the motions were denied. Thereafter, the Court reviewed its jury instructions and Special Verdict form with the parties, prior to charging the jury as to the petitioner's Section 1981 claims. The petitioner and his co-counsel *accepted* them, without objection, except to one stating: "...In order for plaintiff to establish his claim plaintiff has the burden of proving by a preponderance of the evidence that defendant had a racially discriminatory purpose or motive...." (Text of the instructions and the petitioners' objection is set forth in the Appendix at pp. 29a-31a, and 48a.)

The jury voted 7 to 1 that the respondents had *not* unlawfully discriminated against the petitioner under Section 1981, and the Court also found the petitioner's Title VII claims groundless and ordered judgment for the respondents. Thereafter, the petitioner filed motions for Amended Findings of Fact, Judgment n.o.v., and New Trial on his Title VII and Section 1981 claims. On May 4, 1983 the Court denied those motions, and the petitioner appealed that denial to the Court of Appeals. His appeal and motions for rehearing were denied on June 4 and July 17, 1984 respectively. (App. 27a-42a, 1a, and 3a-9a.)

The essential facts established at trial are set forth in the District Court's opinion. (See App. 13a-24a.) They show the petitioner to be well educated and relatively well paid. Shortly before joining Honeywell in 1977 he accused his former employer (Control Data Corporation) of race discrimination, although it had transferred, promoted, and given salary increases to the petitioner on several occasions. He left that company because his pay raises were too slow. Seeking a better opportunity, Mr. Smith contacted and was hired by Honeywell Information Systems (i.e. HIS, a subsidiary of Honeywell Inc.); he worked in HIS for 11 months until May 1, 1978 at which time he accepted a position with Honeywell as its Manager of Import and Export Administration. While employed with HIS the petitioner complained about his job title, office size, and supervisor's work direction—alleging, they were racially biased—and accusing his supervisor of bigotry. The Court below credited his supervisor's testimony that it was apparent Mr. Smith discerned a racial challenge in everything which concerned him or the manner of doing his job.

After transferring to the Honeywell organization things went smoothly for the first few months but, starting in January 1979, a series of incidents occurred over the next 18 months which resulted in clashes between the petitioner and his supervisor. The incidents complained of by Mr. Smith were controversies over a business trip, parking space, vacation time scheduling, business communications, office assignment, criticism by his supervisor, and things of that nature. The petitioner alleged the controversies occurred because of his race, made known his desire to be transferred, and aired his grievances to other persons on several occasions.

The situation was reviewed and investigated by Honeywell representatives throughout 1979 and 1980. Those reviews showed business reasons for actions taken by Mr. Smith's supervisor, that communications between them were poor, and that Smith's charges of race discrimination were without merit. They also showed Mr. Smith had unrealistic expectations and was becoming frustrated at not achieving them. Eventually, the petitioner's supervisor asked that Smith be removed from his position because of his unwillingness to accept direction and unsatisfactory attitudes. Two days later, on July 28, 1980, the petitioner was notified he was being placed on probation for unwillingness to follow directions, deterioration of job performance, and the continuing conflict and office discord it created. When the petitioner did not accept, it was decided Mr. Smith would not accept direction or change his attitude in the future and, therefore, he was terminated.

The Court below also found that the respondents articulated non-discriminatory business reasons for its actions, that there were no job openings available to which the petitioner could be transferred (although Honeywell made sincere efforts to do so), and there was no evidence of disparate treatment. It also found that the petitioner was hired by the respondents in July 1977 at $26,400.00 per year, received four pay increases, and was receiving $36,540.00 per year when he was discharged in July, 1980.

SUMMARY OF ARGUMENT

The petition for Writ of Certiorari should be denied. The petitioner has presented no special and important reasons why it should be granted, in that there is no showing that the Courts' decisions below: (a) are incorrect as a matter of law, (b) in conflict with another federal Court of Appeals on the same matter, (c) departed from the accepted and usual course of judicial proceedings, or (d) decided an important question of federal law which has not been settled or in conflict with applicable decisions of this Court. *Rule 17 of the Rules of the Supreme Court.*

ARGUMENT

1. The Courts did not commit error by permitting the petitioner to proceed pro se, and he has not been denied substantial justice.

The record shows that the petitioner, a law school graduage, voluntarily consented to the substitution of himself for his attorney of record approximately 3 months before trial commenced. (App. 44a-45a.) Mr. Smith complains now (for the first time) this condition should be cause for reversal, even though he has not previously made his pro se status the subject of a motion or asserted as an issue for review at any stage in earlier proceedings. Even now the petitioner does not reveal the reason why the substitution occurred. While it is preferable for a litigant to retain experienced counsel at all times, there is no requirement to do so; there are no rules in the District Court for Minnesota or the Eighth Circuit Court of Appeals that the Court's permission is needed for the substitution in this jurisdiction, nor does the petitioner cite any applicable cases to the contrary. Thus, his reference to *Rule DR 2-110(A) of the Code of Professional Responsibility* is not applicable. In fact, *Rule DR2-110(C)(5)* clearly states a lawyer may with-

draw when . . . "His client knowingly and freely assents to termination of his employment."

While Mr. Smith has stated his self-representation as reason for his omissions and positions taken in earlier proceedings, there is no evidence that he previously requested or was prevented by education or financial position from obtaining relief from that condition. Also, the petitioner did, in fact, retain licensed counsel during the actual trial. In that he knowingly consented to act pro se long before trial, and made no claims with the Court to change that condition, it was not error for the District Court to permit him to act in that capacity. Moreover, the petitioner did not raise this circumstance as an issue for reversal in his appeal to the Court of Appeals. Where an issue is neither raised, nor considered by the Court below, this Court should not consider it. *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958), reh. den. 355 U.S. 967 (1958); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2. (1970); *Brown v. United States,* 411 U.S. 223, 230 n.4 (1973); *Duigan v. U.S.,* 274 U.S. 195, 200 (1927).

2. The District Court did not commit error for remarks made in the presence of the jury. The petitioner's own actions at trial and his conduct as a witness gave reason for the remarks and, in context, did not deny him a fair trial.

The petitioner seeks reversal of the jury verdict on his Section 1981 claims on the grounds it was "prejudiced" by the trial judge's (a) rulings on objections raised by respondent's attorney, (b) instructions that the petitioner be responsive while being cross-examined, and (c) threatening the petitioner with contempt. However, the petitioner does

not show the respondents attorney's objections or questions were legally improper, or that the judge's directives to be responsive were wrong as a matter of law. Moreover, the judge's reference to possible contempt came only after the petitioner's continued failure to be responsive; obviously, it was made in an attempt to control the trial. Although the petitioner raised this contention as an issue for review to the Court of appeals, that Court found (after review of the trial record) that, in context, the judge's remarks did not deny Smith a fair trial or constitute reversible error. (App. 7a-8a.) No authority is here cited by the petitioner why this Court should rule otherwise.

3. The District Court did not commit error in its instructions to the jury. They substantially and fairly presented the issue of race discrimination to the jury, and a party is not entitled to a particular language of its choice. Also, the petitioner did not timely object before the instructions were given.

The petitioner also argues for reversal of the jury verdict on his Section 1981 claims, on the ground that the jury instructions were incomplete. However, the law is clear that the form and extent of instructions are within the discretion of the Court, so long as they sufficiently cover the case so a jury can intelligently determine the questions presented, and it correctly states the principle of law. A party is not entitled to have a jury instructed in the particular language of its choice. The charge is to be read as a whole for fairness to both parties and to determine that the substance of the case is adequately covered. If so, a judgment will not be disturbed because further amplification is refused. *U.S. v. Baver*, 331 U.S. 532 (1947); *Leathers v. U.S., 471 F.2d 856 (8th Cir. 1972), cert. den.*

412 U.S. 932; *Baker v. Preferred Mutual Ins. Co.*. 569 F.2d 1347 (5th Cir. 1978); *Simpson v. Norwesco Inc.*, 583 F.2d 1007 (8th Cir. 1978); *Stineman v. Fontbonne College*. 664 F.2d 1082, 1087 (8th Cir. 1981). In reviewing the petitioner's argument, the Court of Appeals found "...Most of Smith's contentions were presented to the jury, and *the instructions taken as a whole were adequate* to submit the substance of Smith's unlawful discrimination claim to the jury." (emphasis added) (App. 6a.)

Also, *Rule 51 of the Federal Rules of Civil Procedure* requires that any objection to instructions be made before the jury retires. Mr. Smith *and his co-counsel* were given opportunity to do so; they in fact accepted the Court's jury instruction, except one relating to the burden of proof. (App. 48a.) Thus, the Court of Appeals correctly found the petitioner waived this basis of appeal, and it should not be accepted. (App. 6a, 7a.) *Missouri Pacific R.R. Co. v. Star City Gravel Co.*, 592 F.2d 455, 459 (8th Cir. 1979).

4. The District Court's Findings of Fact is not erroneous as a matter of law.

First, it is clear that the Trial judge used the correct legal standard for determining the burden of persuasion required of the respective parties in a Title VII case (App. 12a, 13a.) The petitioner argues, however, that the Court's evaluation of the trial evidence was misplaced, when it ruled that:

> "...Plaintiff has failed to persuade this Court, in any of the instances of alleged disparate treatment, that he was treated any differently than any other employee would have been treated in the same or similar circumstances. Proof of this discriminatory motive was crucial to plaintiff's case. *International Brotherhood*

of Teamsters v. United States, 431 U.S. 324 (1977); *Johnson v. Bunny Bread Company,* 646 F.2d 1250 (8th Cir. 1981) ....He has failed to do so." (App. 25a, 26a.)

It is clear from the Trial Court's original findings, and its review of the petitioner's Motion for Amended Findings of Fact (App. 36a-41a), that the Court did not err in evaluating the facts established at trial by *both* parties. The petitioner's argument to this Court does not show otherwise, because (as the Trial Court found) "...[it] omits mention of most of the evidence pertaining to the incident or event which is not favorable to [the petitioner's] contention." (App. 37a.)

Moreover, on review, a finding of fact is not reversible unless it is clearly erroneous, nor is it necessary for the judge to make specific findings on all the facts or refer to every item of evidence. *FRCP, Rule 52; Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *Craik v. Minnesota State Univ. Bd.,* No. 82-1930, slip op. (8th Cir. March 23, 1984). The Court of Appeals agreed that "...a review of the [record] indicates that the evidence supports the ... findings...the Trial Court did not err..." (App. 5a.) The petitioner's request for yet another review of the facts by this Court does not present a "special or important" issue to the Court, and it should not be accepted.

5. The Trial Court's jury instruction on standards of proof required of the petitioner to prove his Section 1981 claims was correct as a matter of law.

It is now clearly settled that a litigant asserting a violation of Section 1981 of the Civil Rights Act of 1866 must prove the defendant guilty of intentional discrimination—it is not enough to merely show disparate treatment.

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982). Even so, Mr. Smith attempts to argue that the Court's use of the term "purposeful discrimination" therein is confusing and Certiorari should be granted to clarify its meaning. It is submitted only the petitioner is confused. This Court was clear when it stated the question is "...whether liability under 42 U.S.C. §1981 requires discriminatory intent..." *Gen'l Bldg. Cont. Ass'n,* supra, at page 378. It answered in the affirmative.

The Trial Court's jury instruction was in accord with this standard. (The full instructions given, and the Trial Court's review of this contention when Smith moved for judgment n.o.v., is set forth in the Appendix at pp. 29a-32a.) While it is agreed that intent involves a state of mind, the Court also correctly instructed the jury that the requisite intent may be inferred from the defendant's statements, acts, or omissions. The jury reached no such inference; the instructions it received were legally correct and its verdict, based on the facts it heard, should not be disturbed.

Clearly, the petitioner places great emphasis on his contention that he should *not* be required to show the respondents intended (i.e., had a purpose or motive), at least in part, to act as they did *because* Mr. Smith is black. The reason is obvious; it would be easier for him to prevail under a lesser standard of proof. However, the issue here is whether the Trial Court's jury instruction was a correct statement of the settled law. This Court exhaustively examined the question in *General Bldg. Contractors Assn.,* supra, and has clearly held a showing of differential treatment alone is not enough; there must also be proof that the respondents decided to act as they did *because* Mr. Smith is black. The Court's jury instruction asked no more and no less. Mr. Smith's petition presents no basis for finding the Court erred in doing so, or that it should be reversed as a matter of law.

CONCLUSION

Having had a full opportunity to show that his employment was affected by impermissable bias—and failing to show that the instructions, conduct, or findings of the Trial Court were wrong as a matter of law—petitioner should not be granted a Writ simply because he disagrees with the conclusions of the Courts below. Petitioner consented to act pro se in this litigation prior to trial and employed counsel to assist him at trial, and has not earlier asserted that as ground for reversal. There is no substantial issue of law here presented for review. Thus, his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals should be denied.

Respectfully submitted,

James A. Kaehler
Attorney for Respondents

APPENDIX

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the District of Minnesota

File Number Civ. N. 3-81-343

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc. a Delaware Corporation and Honeywell Information Systems, Inc. a Delaware Corporation,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Alvin W. Smith, Plaintiff above named, hereby appeals to the United States Court of Appeals for the 8th Circuit from the order denying Plaintiff's motions for:

1. Motion for Judgment Notwithstanding the Verdict (Rule 50(b)) or for a New Trial (Rule 59) under 42 U.S.C. § 1981 tried to the jury.
2. Motion for Amending the Findings of the Court (Rule 52(b)) or a New Trial (Rule 59) on Title VII, 42 U.S.C. § 2000 e. et. seq. tried to the bench.

entered in this action on the 5th day of May, 1983.

Dated: May 25, 1983.

By /s/ Alvin W. Smith
Plaintiff
Attorney Pro Se
8143 14th Avenue South
Bloomington, Minnesota 55420
612-482-3085

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1744

Alvin W. Smith,

Appellant,

v.

Honeywell, Inc.,

Appellee.

On Appeal from the United States District Court for the District of Minnesota.

Submitted: May 15, 1984
Filed: June 4, 1984

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

Alvin Smith brought this employment discrimination action under both Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §1981. He alleges that Honeywell, Inc., and its subsidiary, Honeywell Information Systems Inc. (Honeywell), discriminated against him because of his race in his initial hiring, in various actions taken during the course of his employment, and in the decision to discharge him. After trial before a United States Magistrate,[1] the jury re-

[1]The parties consented to try the case before the Hon. Patrick J. McNulty, United States Magistrate for the District of Minnesota, pursuant to 28 U.S.C. §636(c)(1). Because Smith asserted the same facts in support of both claims, the parties agreed to try the case to the court and the jury simultaneously.

turned a verdict in favor of Honeywell on the §1981 claims, and the magistrate ordered judgment for Honeywell on the Title VII claims. Thereafter, Smith[2] filed a Motion for Amended Findings of Fact or a New Trial on his Title VII cause of action, and a Motion for Judgment N.O.V. or a New Trial on his §1981 cause of action. The magistrate denied the motions and Smith appeals.

TITLE VII CLAIMS

Smith first contends that the trial court erred in denying him a new trial on his Title VII claims because the magistrate erroneously required him to show that Honeywell *intentionally* discriminated against him because of his race. Smith argues that a showing of intent is not required, and that to prevail he need only show that he was treated differently than other employees. This contention is without merit. A plaintiff alleging disparate treatment in a Title VII case has the burden of persuading the court that he is the victim of intentional discrimination. See, *e.g., Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *Craik v. Minnesota State University Board,* No. 82-1930, slip op. at 4 (8th Cir. March 23, 1984). The trial court did not incorrectly state the applicable law, nor did it abuse its discretion in denying the motion for a new trial on the Title VII claims.

Smith next contends that the trial court erred in denying his motion for amended findings of fact because the magistrate's factual determinations on his Title VII claims were not consistent with the evidence presented at trial and ignored relevant portions of his complaint. During Smith's eight-day trial, evidence was presented addressing num-

[2]Smith, a law school graduate, acted *pro se* at trial (though an attorney was present to assist him at various stages of the trial), and is proceeding *pro se* on appeal.

erous allegations of discriminatory treatment.[3] "[A] trial judge need not make specific findings on all facts nor refer to every item of evidence introduced in a lengthy trial. ..." *Craik v. Minnesota State University Board, supra,* slip op. at 10. In the present case, it appears that the magistrate adequately considered the evidence presented at trial and the issues raised in the pleadings in arriving at his conclusions.

This Court may set aside factual findings about an employer's discriminatory intent only if the findings are clearly erroneous. *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). No such mistake is apparent in the case at hand. A review of the file and records indicates that the evidence supports the magistrate's findings. The trial court did not err when it denied Smith's motion for amended findings of fact on his Title VII claims.

SECTION 1981 CLAIMS

Smith argues that the trial court erred in denying the motion for judgment n.o.v. on his §1981 claims because "sufficient evidence was presented at trial . . . to prove discrimination." The reviewing court "may set aside a jury verdict only when there is no evidence of substance upon which reasonable persons could differ." *Ybarra v. Burlington Northern, Inc.,* 689 F.2d 147, 150 (8th Cir.

[3]Smith's complaint contains roughly ten separate allegations of discrimnatory treatment by Honeywell, including claims that defendants provided him with undesirable office space; hired him for a job with one title and gave him a job with another; denied him travel necessary to do his job; subjected him to abusive language; and discriminated against him in promotional opportunities and other job benefits.

1982). The evidence must be viewed in the light most favorable to the jury's verdict, giving the prevailing party the benefit of all reasonable inferences which may be drawn from the evidence. See, *e.g., Harris v. Pirch,* 677 F.2d 681, 683 (8th Cir. 1982). Applying these principles, the evidence on the record was sufficient for the jury reasonably to conclude that Honeywell did not intentionally discriminate against Smith because of his race. Therefore, the trial court correctly denied the motion for judgment n.o.v

Smith next asserts that he should have been granted a new trial on his §1981 claims because the jury instructions did not address all the issues in his complaint. This allegation of error has not been properly preserved for appellate review. Smith did not request additional instructions about particular acts of discrimination, nor did he alert the trial court to the alleged omissions in a timely manner as required by Fed. R. Civ. P. 51. See, *e.g., Missouri Pacific R.R. Co. v. Star City Gravel Co.,* 592 F.2d 455, 459 (8th Cir. 1979). Moreover, any plain error exception to compliance with Rule 51 is "confined to the exceptional case where error has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Rowe International, Inc. v. J-B Enterprises, Inc.,* 647 F.2d 830, 835 (8th Cir. 1981). No such error is demonstrated here. Most of Smith's contentions were presented to the jury, and the instructions taken as a whole were adequate to submit the substance of Smith's unlawful discrimination claim to the jury. He has therefore waived this objection on appeal.

Appellant also objects to the jury instructions on the ground that the definition of discrimination was misleading and confusing because the instructions "asked the jury

to look at the *intent* of the defendants rather than the *purposeful act* of the defendants." Smith seems to be drawing a distinction without a difference. Presumably, he is again raising the objection made at trial: that the instructions incorrectly imposed on the plaintiff the burden of proving by a preponderance of the evidence that defendants had a racially discriminatory purpose or motive, and that it was not sufficient for Smith simply to show that he was black and was treated differently. The Supreme Court has clearly stated that liability cannot be imposed under §1981 without proof of intentional (or "purposeful") discrimination. *General Building Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375 (1982). Smith is not entitled to a new trial on his §1981 claims on this basis.

Smith further contends that he is entitled to a new trial because the special verdict form given to the jury did not accurately reflect all the issues in his complaint. The form directly asked the jury to determine whether the defendants had unlawfully discriminated against Smith. The instructions adequately informed the jury about what constituted "unlawful discrimination." The record reflects that Smith agreed to have the issues presented to the jury on a special verdict form, and did not raise a timely objection to any errors or omissions in that form. This issue has thus not been preserved for appellate review.

Finally, Smith charges that the disparaging actions of the magistrate prejudiced the presentation of his case to the jury. The record suggests that the magistrate was frustrated at times by appellant's actions at trial, particularly Smith's conduct as a witness. The magistrate sustained a number of objections to unresponsive answers by Smith, and at one point said: "You lawyers are all alike. You don't listen to the question. Listen to the question and then answer that question." (Tr. Vol. IV p. 77). Later the

magistrate ordered an unresponsive answer stricken, instructing Smith "to answer the question or face a contempt charge." (Tr. Vol. IV p. 189). In context, it appears that neither these nor other remarks and rulings by the magistrate were sufficient to deny Smith a fair trial or to constitute reversible error.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1744-MN

September Term, 1983

Alvin W. Smith,

Appellant,

vs.

Honeywell, Inc., etc., et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 17, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W .Smith,

Plaintiff,

vs.

Honeywell, Inc., a Delaware Corporation and Honeywell Information Systems, Inc., a Delaware Corporation,

Defendants.

MEMORANDUM DECISION AND ORDER FOR JUDGMENT

Civ. No. 3-81-343

At Duluth, in said District, this 8th day of March, 1983.

The above-titled case came on for trial before the undersigned United States Magistrate pursuant to provisions of Title 28 U.S.C. §636(c) (1). This case presents two causes of action. One premised upon provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, *Title 42 U.S.C. §2000e et. seq.*, and the other upon provisions of the Civil Rights Act of 1866, *Title 42 U.S.C. §1981.* Because the elements of proof in an action premised on Title VII differ slightly from those in an action premised on Section 1981, and because plaintiff was not entitled to a jury trial of the action premised on provisions of Title VII, it was determined that all evidence would be pre-

sented in one trial, after which a jury would render a verdict on the cause premised on Section 1981, and the court, on the same evidence, where applicable, would enter Findings of Fact, Conclusions of Law, and an Order for Judgment on the cause premised on Title VII.

I.

There are two defendants named in this action. The actions against both defendants were cognizable under the provisions of Title 42 U.S.C. §1981. However, during pretrial skirmishing, it was determined that plaintiff's claims against Honeywell Information Systems, Inc., which were premised upon provisions of Title VII, were time-barred. *Cf., Title 42 U.S.C. §2000e-5(e).* Honeywell Information Systems, Inc., was, therefore, dismissed from the Title VII suit. Evidence to support plaintiff's Section 1981 claims against Honeywell Information Systems, Inc., was, of course, received, but it is considered in the Title VII case only insofar as it may shed light on the true character of matters occurring within the limitation period while plaintiff was employed by Honeywell. *See, United Airlines v. Evans, 431 U.S. 553 (1977).*

The trial consumed eight trial days, and, upon stipulation and agreement, the §1981 action was submitted to a jury of eight persons upon a special verdict form. After deliberating in excess of six hours, the jury returned a 7/8ths verdict which found neither defendant guilty of acts of discrimination against plaintiff which are prohibited by provisions of Title 42 U.S.C. §1981.

Trial of this action became a little more unwieldy than is customary, because plaintiff participated in the major portion of the proceedings as his own attorney. He was assisted by experienced trial counsel only sporadically. This resulted in some rather strange modes of interrogation, and

the introduction of a good deal of evidence extraneous to the issues. The court's efforts to manage the procedure by direction and instruction to plaintiff were largely unavailing.

II.

At the conclusion of introduction of evidence in a Title VII case, the court must evaluate all of the evidence adduced by both parties, and enter Findings of Fact and Conclusions of Law in accordance with provisions of Rule 52, *Federal Rules of Civil Procedure*. The facts must be found and stated specially, but, on occasions, a narrative or memorandum decision seems best suited to accomplish the purpose of Findings of Fact with continuity and clarity. Because plaintiff's grievances do not flow from a single incident, but are related to a course of conduct and charges of racial discrimination permeating the entire length of the relationship between the parties, this mode has been adopted herein, and is deemed to comply with form requirements of the Federal Rules of Civil Procedure and Local Rules of the United States District Court, District of Minnesota.

It is now well established, that, in employment discrimination cases, an adaptation of the format employed in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*, to the factual situation presented should be utilized in assessing the evidence. Plaintiff relies on a disparate treatment theory. A case presented on this theory divides into three phases. First, plaintiff must establish a prima facie case by presenting facts which are sufficient to sustain an inference that the action by the employer of which plaintiff complains was at least partially motivated by impermissible considerations. *Furnco Const. Co. v. Waters, 439 U.S. 567 (1978); Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977)*. To rebut this prima facie case, the

employer must then go forward with the evidence and articulate a legitimate, non-discriminatory reason for the action which plaintiff challenges. *Johnson v. Bunny Bread Company, 646 F.2d 1250 (8th Cir. 1981); Ligons v. Bechtel Power Corp., 625 F.2d 771 (8th Cir. 1980).* This obligation does not entail assumption of the burden of proving the absence of an illegal motive, but merely the burden of production of evidence from which a non-discriminatory motive can be inferred. *Kirby v. Colony Furniture Co.*, 613 F.2d 696 (8th Cir. 1980). If this is accomplished, the burden of going forward with the evidence, to establish that the proferred reasons are merely pretexual, shifts to plaintiff. *Person v. J. S. Alberici Const. Co., Inc., 640 F.2d 916 (8th Cir. 1981); McCosh v. City of Grand Forks,* 628 F.2d 1058 (8th Cir. 1980); *Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976).*

Two things should be noted. Some courts loosely speak of a shifting of the burden of proof. This is technically incorrect. The burden of persuasion always lies with the plaintiff. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).* Secondly, the utilization of this tripartite trellis to analyze the evidence should not affect the conduct of the proceedings. Shifting the burden of going forward with the evidence does not result in a trifurcation of the trial.

With these preliminaries in mind, we can turn to the facts as the court finds them.

III.

Alvin W. Smith, the plaintiff, is a 38 year old black male. He graduated from the University of Akron, Akron, Ohio, with a B.S. degree in mathematics in 1967. Shortly after graduation, he obtained employment as an engineer with Babcock and Wilcox Corporation. While an undergraduate he was a member of the R.O.T.C., and he en-

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tered into mandatory active duty in the army as a Second Lieutenant in August, 1967. He was honorably discharged as a Captain in October, 1970, and returned to employment with Babcock and Wilcox for about two years. During this time, he pursued post-graduate study at the University of Akron in applied mathematics. From late 1972 to April, 1973, he was employed by General Tire Co. He left this employment to accept a position as a program analyst with Control Data Corp. in Minneapolis. While pursuing this employment, he enrolled in the University of Minnesota and received a M.B.A. degree in 1976. While at Control Data, plaintiff received three intra-company transfers and three promotions. Each was accompanied by an increase in salary.

On June 22, 1977, plaintiff filed a discrimination complaint against Control Data. In this complaint he alleged that he had been unlawfully discriminated against in performance appraisals, salary increases, job assignments, opportunity for transfer, and in a comment which plaintiff characterized as evidence of racial bigotry. After this charge was filed, Control Data reviewed and evaluated position descriptions, and concluded that there was no substantial justification for the position plaintiff held being paid at a lower grade level than comparable positions. On July 22, 1977, after plaintiff had left Control Data, an agreement was reached which provided that plaintiff would be paid $2,7082.50, [sic] which represented the pay differential. It was further agreed, that the settlement was not an admission by Control Data of any violation of Title VII.

During the spring of 1977, plaintiff had mailed resumes to a number of companies seeking employment, because he felt that opportunities for advancement at Control Data were slow, and that his salary was not increasing at an acceptable pace. Plaintiff had entered service with Con-

trol Data at a $13,800.00 annual salary. Four years later his annual salary was $22,680.00.

In about June, 1977, plaintiff met with Ricardo Rietti who, at that time, was manager of Product Management Operation of Honeywell Information Systems, Inc., a subsidiary of Honeywell, Inc. This was a newly created organization whose function was to formulate long-range marketing plans for computers and computer related products. Rietti was assembling a staff, and contacted plaintiff after receiving his resume. At the initial interview, Rietti explained the structure of Honeywell Information Systems, Inc., the role of the Product Management Operation in that structure, and the nature of the work which it was anticipated plaintiff could assume.

On June 7, 1977, Rietti sent a letter to plaintiff offering him a job as Manager, Planning and Support in the Product Management Operation of Honeywell Information Systems, at an annual salary of $26,400.00. Plaintiff accepted this offer, gave notice to Control Data, and on July 7, 1977, left Control Data and reported to Honeywell Information Systems. At this time, he learned that the title he would assume would be Manager, Separately Priced Services. The title originally mentioned was already being used elsewhere in the Honeywell organization and was unavailable to the Product Management Operation. The new title was developed by senior management to reflect a description of the job content. This change of title did not affect the salary or duties of the position which plaintiff had accepted, but plaintiff immediately made an issue of this change of title, and attributed it to racial prejudice. At the outset, plaintiff was also assigned an office with which he was displeased. Although he was the junior member of the organization, and this was the only office available, plaintiff expressed entitlement to a larger

office, and attributed these unsatisfactory quarters to his race. Shortly thereafter, the space assigned to the Product Management Operation was enlarged, and the entire staff was relocated. Plaintiff, evidentally, was more satisfied with his office thereafter. However, within a few months, plaintiff began to show resentment towards Rietti whenever instructions were issued, or comments made on the manner in which plaintiff's job should be performed. On one occasion, plaintiff accused Rietti of bigotry. The lack of basis for this charge is evidenced by Rietti's reaction. Rietti, an Italian national, had to look to the dictionary for a definition of the word, and found the definition and the concept unfamiliar and foreign to his cultural background. Rietti testified that it became apparent to him that plaintiff discerned a racial challenge in everything which concerned him or the manner in which he was performing his job.

During this time, plaintiff began to explore for opportunities elsewhere in the Honeywell family. At a casual meeting in the company cafeteria, plaintiff expressed a desire for a promotional transfer to Mr. William Griffin, who, as Manager of Corporate Transportation and Documentation for Honeywell, Inc., had responsibility for transportation, export control and customs matters worldwide. Coincidentally, at this time, part of the operation which Griffin supervised was being moved from Boston to Minneapolis, and he was looking for someone to fill a position in the export control area. This casual meeting blossomed into an offer of the position of Manager, Import and Export Administration in the Corporate Transportation Department. Plaintiff accepted, and joined Honeywell, Inc. on May 1, 1978, at an annual salary of $29,340.00, the same salary he was then receiving at Honeywell Information Systems.

In the meantime plaintiff had enrolled in William Mitchell College of Law. He pursued his education in law throughout his employment at Honeywell, and received a J.D. degree in 1981. This education was paid for largely by a combination of benefits from the G.I. Bill and a direct subsidy by Honeywell.

In addition to plaintiff, Griffin's staff included a Manager of Transportation and Distribution, which position was held by Robert Maidman.

During the first few months of his employment, plaintiff was in a learning process and intra-office relationships were reasonably smooth. As time went on, however, Griffin received complaints from Honeywell employees in Minneapolis, Washington, Phoenix, Denver, and Colorado Springs that plaintiff was becoming quite disagreeable and discourteous. This attitudinal problem also manifested itself in plaintiff's relationship with Griffin, his immediate supervisor. Some of the events which precipitated a clash between plaintiff and Griffin seemed to be relatively minor in nature, but the confrontations which ensued were not. For clarity, the major incidents which plaintiff contends evidence racial discrimination, and which defendants contend ultimately led to plaintiff's termination for sound business reasons, will be discussed separately.

In January, 1979, plaintiff requested authority to travel to the Phoenix plant. Griffin denied permission for this trip. Plaintiff persisted in his request, in person and in writing. Upon Griffin's final refusal, and plaintiff's continued insistence, heated words were exchanged. Plaintiff alleges this incident as one of racial prejudice. At that time, travel by Honeywell employees was being curtailed for economic reasons. The responsibility for matters reposed in the Corporate Transportation Department was ultimately Griffin's, including whether or not travel was necessary

to the efficient administration of import-export matters. Neither Griffin's authority to make these decisions, nor whether or not his decisions were always right, is an issue. Only the motivation for the denial is of import. Regardless, the matter with which plaintiff was concerned was eventually solved by a telephone call, which indicates that the decision by Griffin was sound, and that the denial was based upon a business reason and not upon racial considerations. There is evidence in the case that travel requests by more senior members of management in Honeywell were also denied during this period. Plaintiff's effort to establish disparate treatment by a comparison of his authorized travel with that of Maidman is unavailing. The duties of their respective jobs, and the sphere of their respective responsibilities, differed, and the necessity of travel to the performance of their duties is not validly comparable.

During the same period of time, plaintiff had repeatedly parked his car in a parking ramp which was reserved for senior corporate officers, instead of in the lot to which he was assigned. In February, 1979, Griffin ordered plaintiff to remove his car from the ramp, and to park it in its assigned spot. Plaintiff replied that he would park on the street. Griffin told him to park it in the lot, and plaintiff replied to the effect that he would park where he pleased. Plaintiff admitted that on at least one occasion thereafter he defied Griffin and parked his car in the ramp. Honeywell policy was to report parking violations to the supervisor of the department in which the violator worked, and the supervisor had the responsibility for correcting the miscreant. Plaintiff failed to produce evidence that any other similarly situated lower echelon employee was granted more desirable parking privileges than those afforded him, or that any other unauthorized person presumed to park in the ramp with impunity. The importance of this incident, however, is not the minor infraction of company

rules for which plaintiff was corrected, but the belligerence with which plaintiff received a justifiable reprimand, and his blatant defiance of his superior's directions thereafter. Plaintiff's conduct, and not a strained inference of racial prejudice is what magnified this minor incident to major proportions.

In May, 1979, as the law school examination time neared, difficulty and unpleasantness between Smith and Griffin arose in regard to when and how much time plaintiff would take off to study for exams, and whether or not this time would be compensatory or would be vacation time. On several occasions plaintiff absented himself from the office without prior notification to Griffin. Plaintiff contends that he never asked for compensatory time off, and that, because he was black, Griffin only reluctantly granted permission to take vacation time for this purpose. Griffin testified that he had quite leniently permitted plaintiff to take both vacation and compensatory time to study, and that his only concerns with plaintiff utilizing his vacation time were with advance notice from plaintiff of his absence from duty, and with the likelihood that plaintiff would leave himself no time for a genuine vacation. This difference in recollection aside, it is established that plaintiff was afforded time to study for exams, and the record is devoid of any evidence that plaintiff was faced with any restrictions in this regard which were not universally imposed upon employees, regardless of color.

In August, 1979, plaintiff, with the intervention of another employee, set up a meeting with a senior vice president of Honeywell to discuss his career problems. This precipitated another confrontation when Griffin heard of this meeting and in no uncertain terms expressed his disapproval of plaintiff disregarding the normal chain of

command. Testimony regarding whether or not plaintiff lied to Griffin about how the meeting came to be is in conflict, but it is clear that Griffin believes that plaintiff fabricated a story. In any event, plaintiff's lack of discretion is apparent. Other employees testified that seeking counsel from senior executives was not forbidden, but that to do so without clearing it with the employee's supervisor, and with employee relations department personnel, is not acceptable procedure. Plaintiff contends that Griffin's reaction was because plaintiff is black. Again, however, we have an instance of plaintiff violating protocol and ignoring common courtesy and attributing the reverberation to his color, without any showing that a white employee exhibiting a similar lack of discretion would have been treated any differently.

During plaintiff's tenure at Honeywell, the office space assigned to a number of departments, including the Corporate Transportation Department, was remodeled. The office space, to which persons in plaintiff's echelon of management were assigned, was composed of cubicles with partitions approximately 5 ft. high. The one to which plaintiff was assigned was one which contained a supporting pillar. Plaintiff contends that he was given this less desirable space because of his color. James Remington, Griffin's supervisor, who assigned the space, testified that he grouped the assignments on the basis of organizational units, and that within the units offices were assigned more or less arbitrarily without consideration of whether or not they contained a pillar. All other offices containing a pillar were assigned to whites. The court fails to discern any pattern which indicates that Remington purposely assigned plaintiff an office with a pillar because of his race. It just happened.

A number of other events occurred which resulted in heated exchanges, interspersed with profanity, between

Griffin and plaintiff. These matters included plaintiff's claim of lack of recognition in departmental reports, the inconsistency of Griffin's work directions, plaintiff's complaint of a real or imagined exclusion from preparing performance evaluation for a secretary which he shared with Maidman, the untimely submission of travel expenses and tuition payment requests, and plaintiff sending unauthorized telex messages. All of these resulted in complaints by plaintiff that white employees were receiving better treatment than he was, and that he was being verbally abused. It is of interest to note that at no time was plaintiff subjected to racial slurs, or language which differed in any way from that directed at other employees, or that he was being required to comply with rules and regulations which other employees could ignore, or which were not specific directions from his supervisor based upon sound managerial discretion.

Plaintiff's dissatisfaction with working in Griffin's organization had become manifest by mid-1979. He made this, and a desire for a transfer, known to other members of the corporate staff, and they exerted sincere and reasonable efforts to find a position in the Honeywell organization to which plaintiff could transfer without demotion or decrease in pay. That these efforts did not succeed in locating a satisfactory position into which plaintiff would transfer can be attributed to a number of reasons, but not to a lack of cooperation with plaintiff or to a lack of effort to accommodate his wishes.

Throughout this period of time, plaintiff had a number of lengthy sessions with Myron Amundson, Director of Employee Relations, at which he aired his grievances and expressed his desires. During these conversations plaintiff was indiscreetly critical of Griffin, calling him a fool, crazy, and totally irrational. Griffin brought what he characterized as plaintiff's gross insubordination to

Amundson's attention. Amundson listened to both, and tried to advise and guide plaintiff without avail.

Plaintiff also had a series of conferences with James Remington, Director of Procurement, Griffin's immediate supervisor. Remington also attempted to advise and guide plaintiff and to mediate the apparent problems.

Griffin testified that, in January, 1980, he was informed by a senior Commerce Department official that plaintiff had complained of the treatment he was receiving from Honeywell and that he was contemplating a class action discrimination suit. Plaintiff denies ever making this statement. The Commerce Department official was not called as a witness, and we are faced with a creditability issue. In view of similar statements made by plaintiff to a number of other persons on a number of other occasions, the likelihood that he made this statement on this occasion is far greater than the likelihood that Griffin fabricated the story from whole cloth, and, whether or not plaintiff verbalized this threat to this official on this occasion, this Court is persuaded that Griffin believes that he did. Naturally, this could do little to cement a sound business relationship between supervisor and supervised.

In February, 1980, Griffin submitted a memo to Amundson informing him that plaintiff was dissatisfied with his prospects at Honeywell and was seeking employment elsewhere. Griffin asked that a 90 day limitation to plaintiff's employment be imposed. It was not, and efforts by Amundson and Remington to ameliorate the situation continued.

In April, 1980, Amundson, directed William Tyler, Corporate EEO Manager, to investigate and report to him on the situation in Griffin's organization. Tyler interviewed plaintiff, Griffin and Remington, separately, with a view to ascertaining facts and forming conclusions. Plaintiff, as instances of racial discrimination, raised most of the is-

sues which he had previously raised with Griffin, Remington and Amundson, which are discussed above. Tyler found that there were apparently sound business reasons for actions which Griffin had taken, that communication between Griffin and plaintiff was poor, that there was no evidence of disparate treatment, and concluded that the charges of racial discrimination were without merit. Tyler observed that plaintiff's career expectations were unrealistic, that plaintiff was becoming frustrated at being unable to reach these objectives, and that he had threatened to use his race as leverage. Tyler concluded that it would be best for all concerned if plaintiff were to leave Honeywell. After preparing this report, Tyler met with plaintiff to discuss his findings. This meeting was rather abruptly terminated by plaintiff when he discovered that findings would not be in his favor.

Thereafter, during the month of July, several meetings between plaintiff, Griffin and Remington were held. None of the problems were resolved to plaintiff's satisfaction, and at the conclusion of one of these meetings, plaintiff stood in the doorway of Maidman's office and declared, "I am going to teach them not to (expletive deleted) around with a third year law student." This prompted Maidman to seek an audience with Remington at which he asked that the matter be settled as soon as possible because the whole office was being disrupted.

On July 26, 1980, Griffin submitted a memo to Remington in which he stated that plaintiff's unwillingness to accept comments or criticism, and his general attitude, were wholly unsatisfactory, and requested that plaintiff be removed from his position immediately.

This precipitated a meeting between plaintiff, Griffin and Remington on July 28, 1980. At this meeting, plaintiff was informed that because of his unwillingness to follow directions, and the continuing conflict which resulted, and

because of the deterioration in his job performance, and because of the discord which had disrupted the entire office, he was being placed on probationary status to determine whether or not he could change his attitude in the business environment and dedicate his ability and attention to performing his job. Plaintiff immediately demanded a transfer. Remington explained that this was impossible, because of his record and the general employment conditions within Honeywell. Plaintiff then demanded that he be furnished with precise written day-to-day ground rules and instructions. Remington informed him that this was impossible, that professionals could not be managed in this fashion. Plaintiff was then asked that, if given the past 18 months to live over, would he have done anything differently? Plaintiff refused to answer, and left the meeting. Plaintiff's supervisors concluded that plaintiff felt no compelling need to change his attitude, would not accept instruction and direction in the future, and determined to terminate his employment with Honeywell.

Plaintiff entered the employ of Honeywell Information Systems, Inc., at a $26,400.00 yearly salary, and joined Honeywell, Inc., at a yearly salary of $29,340.00 He received three increases in pay while at Honeywell, and when he was terminated was receiving $36,540.00 per annum. There is nothing in this wage escalation which indicates that race played any part in the remuneration which he received.

IV.

To place all of the evidence in this case in perspective, one must recognize the personal characteristics of the main actors. Griffin was educated at the United States Naval Academy and retains many mannerisms of a professional naval officer. He is brusque, obviously expects almost un-

questioned obedience to orders, and is probably prone to the use of profanity, which, lamentably, is not unusual in persons in high office. Plaintiff is young, almost overly ambitious, independent, very race conscious, and not adverse to exploiting his race to his advantage. When we view the evidence as a whole, we are lead ineluctably to the conclusion that the mass of the conflict distills into Griffin's impression that plaintiff would not follow directions and was defiant and insubordinate, on the one side; and plaintiff's frustration in what he perceived to be a dead end position, and his resentment of Griffin's supervision, on the other. Plaintiff established a prima facie case by showing that he is of a minority race, that he was terminated, and that a white person was hired to fill the position. Defendant rebutted this prima facie case by articulating a sound, non-discriminatory business basis for every one of the actions of which plaintiff complains. Plaintiff has failed to produce evidence which weakens or rebuts defendants' position. It would seem fundamental to a disparate treatment theory, that plaintiff prove that the treatment which he plaintiff is different in character and degree from that received by white employees. Plaintiff has failed to persuade this Court, in any of the instances of alleged disparate treatment, that he was treated any differently than any other employee would have been treated in the same or similar circumstances. Proof of this discriminatory motive was crucial to plaintiff's case. *International Brotherhood of Teamsters v. United States,* 431 *U.S. 324 (1977); Johnson v. Bunny Bread Company, 646 F.2d 1250 (8th Cir. 1981).* Plaintiff assumed the burden of establishing his claim by a preponderance of the evidence. *Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980).* Proving that an articulated justification for an employer's action is pretext is no more than exposing a

discriminatory motive. To prove pretext, plaintiff had the burden of showing a similarity between his conduct and that of white employees, and a disparity or difference in treatment of such conduct when committed by white employees and that which he received. *Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524 (8th Cir. 1977)*. He has failed to do so. Instead, the evidence is overwhelming that plaintiff was treated no differently than any other employee by Honeywell, and that his discharge was for insubordination. Insubordination is a legitimate ground upon which to base a discharge. *Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980)*.

WHEREFORE, It is:

ORDERED:

That judgment be entered for defendants.

BY THE COURT:

/s/ Patrick J. McNulty
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plair.tiff,

vs.

Honeywell, Inc., a Delaware Corporation and Honeywell Information Systems, Inc., a Delaware Corporation,

Defendants.

ORDER
Civ. No. 3-81-343

At Duluth, in said District, this 4th day of May, 1983.

The above-titled case came on for hearing before the undersigned United States Magistrate, in accordance with provisions of Title 28 U.S.C. §636(c) (1), upon post-trial motions by plaintiff. Plaintiff appears pro se and defendants appear by James A. Kaehler, Esq.

I.

The case was tried in an extraordinary fashion. It presents two causes of action. One premised upon provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. *Title 42 U.S.C. §2000e et. seq.*, and the other upon provisions of the Civil Rights Act of 1866, *Title 42 U.S.C. §1981*. Because the elements of proof in an action premised on Title VII differ slightly from those in an action premised on Section 1981, because Honeywell Information Systems, Inc. was not subject to Title VII liability, and because plaintiff

was not entitled to a jury trial of the action premised on provisions of Title VII. it was determined that all evidence would be presented in one trial; after which a jury would render a verdict on the cause premised on Section 1981, and the court, on the same evidence, where applicable, would enter Findings of Fact, Conclusions of Law, and an Order for Judgment on the cause premised on Title VII.

The trial consumed eight trial days, and, upon stipulation and agreement, the §1981 action was submitted to a jury of eight persons upon a special verdict form. After deliberating in excess of six hours, the jury returned a 7/8th verdict which found neither defendant guilty of acts of discrimination against plaintiff which are prohibited by provisions of Title 42 U.S.C. §1981.

On March 8, 1983, the court entered Findings of Fact and Conclusions of Law adverse to plaintiff's Title VII claims, and ordered judgment for Honeywell, Inc.

Plaintiff's motions are for a judgment notwithstanding the verdict or for a new trial in the Section 1981 action tried to the jury, and for Amended Findings of Fact or for a new trial on the Title VII cause of action tried to the bench.

II.

The motion for judgment n.o.v. can be, quite properly, joined with a motion for a new trial, *Rule 50(b), Federal Rules of Civil Procedure*, and a motion for amended findings can be, quite properly, joined with a motion for a new trial. *Rule 52(b), Federal Rules of Civil Procedure*. However, the motions have distinct functions, and the standards which govern their determination accordingly differ. *See, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940); Simpson v. Skelly Oil Company, 371 F.2d 563 (8th Cir.*

1967). The defendant does not claim that the Court's instructions to the jury, by inclusion or exclusion, constitute, in whole or in part, an error in fundamental law, and he does not claim that the court's conclusions of law contain error, in and of themselves, with one minor exception. Defendant's attack is directed primarily to the issue of whether or not factual findings by the court and jury are supported by the evidence. There was some allusion to an erroneous view of the law taken by the court in plaintiff's motion papers, to which the court will allude later. To remove any ambiguity from plaintiff's position, the court, at the conclusion of plaintiff's presentation, directly asked plaintiff whether or not he was seeking relief based upon a quarrel with the court's interpretation of controlling law. The plaintiff, without qualification, confirmed his intent to rely solely on error in factual findings.

III.

In the moving papers seeking judgment n.o.v., plaintiff has taken the position that to sustain his causes of action it was not necessary that he prove a discriminatory motive, or an intent to discriminate, by a defendant. The court is not comfortable resting on the assumption that plaintiff will adhere to the abandonment of this contention made during argument on these motions. It will, therefore, be briefly discussed. As nearly as the court can now reconstruct, without recourse to a transcript, in the charge to the jury the court read Section 1981, and then instructed that:

> "...the Civil Rights Act makes it unlawful for an employer to differentiate in conditions of employment or to discharge or terminate the employment of any person for the reason of that person's race.

Not every difference in conditions of employment or every discharge or termination of a black person is unlawful under the Act. The mere fact that plaintiff is black and was also treated differently or is discharged is not sufficient in and of itself to establish plaintiff's claim or to show a violation of the Act.

In order for plaintiff to establish his claim, plaintiff has the burden of proving by a preponderance of the evidence that defendant had a racially discriminatory purpose or motive in differentiating in conditions or terminating plaintiff's employment.

If you find that the differentiation or the discharge of the plaintiff by defendant was not for the reason of his race, then there would be no violation of the Civil Rights Act, and the differentiation or the discharge would be lawful.

* * *

The plaintiff's claim against the defendant in this case has three essential elements, as follows:

FIRST: That the defendant intentionally discriminated against the plaintiff in connection with his employment, or with respect to the termination of employment;

SECOND: That the effective reason for such intentional discrimination was the race of the plaintiff; and

THIRD: That as a direct result of such intentional discrimination the plaintiff sustained damages.

Plaintiff has the burden of proving each of these essential elements by a preponderance of the evidence.

* * *

> Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances proven which indicate his state of mind."

This is also the approach which this Court adopted in the Title VII case, on what was felt to be determinative authority. *Cf., Washington v. Davis, 426 U.S. 299 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).* More recently, in *General Building Contractors Ass'n. v. Pennsylvania, —— U.S. ——, 102 S.Ct. 3141, 73 L.Ed. 835, 29 F.E.P. 139 (1982),* the Court addressed the issue exhaustively, and concluded that:

> "...§1981, like the Equal Protection Clause, can be violated only by purposeful discrimination."

In a recent Title VII case, the Court stated the proposition thusly:

> "The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.' *Burdine supra, at 253.* In other words, is 'the employer ... treating some people less favorably than others because of their race, color, religion, sex, or national origin.' "

United States Postal Service Board of Governors v. Aikens, No. 81-1044, slip. op. (United States Supreme Court, April 4, 1983).

Plaintiff contends that "the jury instruction for determination of liability required a showing of *intentional* discrimination because of race rather than a showing of discriminatory impact." This Court agrees, but is convinced that this is the law, and concludes that the fault which plaintiff finds with the precept rests upon a misapplication of what the courts have stated is necessary to establish a prima facie case under the first leg of the *Burdine* procedure, or upon a confusion of the facts of this case with those concerned with employer policy or practices which are facially neutral, but discriminatory in effect.

One can almost always find through hindsight that a proposition could have been stated more clearly or precisely. That may be true in this case, but this Court is not persuaded that this case was submitted to the jury under instructions which in their totality imposed a greater burden of proof upon plaintiff than the law dictates, and is certain that the law as articulated by the Supreme Court was applied in the determination of the Title VII case. The burden of proof which plaintiff assumed was to establish by the greater weight of the evidence that a racially discriminatory motive played a part, or contributed, to the conditions of employment of which he complains or to his discharge.

We can turn then to the avowed basis for plaintiff's claims for relief presented by these motions.

IV.

JUDGMENT NOTWITHSTANDING THE VERDICT

In determining a motion for judgment n.o.v., a court is not free to exercise judicial discretion. The only question for determination by the court is whether or not there was sufficient evidence to raise a fact issue to submit to the jury, without any assessment of the credibility of witnesses and without regard to the weight of the evidence. Whether

or not the evidence was sufficient to create an issue of fact justifying the submission of the case to the jury is a question of law, *Clarke v. Chicago & N.W. Ry. Co., 63 F. Supp. 579 (Minn. 1945)*, and is determined by the same standards utilized in determining a motion for directed verdict. *Dulin v. Circle F Industries, Inc., 558 F.2d 456 (8th Cir. 1977)*. The motion, if granted, results in depriving the opposing party of a trial by jury and must be granted at caution. *Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); General Corporation v. General Motors Corporation, 184 F. Supp. 231 (Minn. 1960)*. The Court's inquiry, therefore, regardless of the various ways in which it has been stated, is directed to determining whether or not the evidence, viewed in the light most favorable to the prevailing party, is such that reasonable men could have reached nothing other than a conclusion which is contrary to that of the jury. *Cf., Giordano v. Lee, 434 F.2d 1227 (8th Cir. 1970), cert. den. 403 U.S. 931 (1971); Banks v. Koehring Co., 538 F.2d 176 (8th Cir. 1976); E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635 (Minn. 1979); Quast v. United States, 293 F. Supp. 56 (Minn. 1968); LaPlante v. Radisson Hotel Company, 292 F. Supp. 705 (Minn. 1968); Zoll v. Eastern Allamakee Community School District, 588 F.2d 246 (8th Cir. 1978); Giordano v. Lee, 434 F.2d 1227 (8th Cir. 1970)*. The standards which this trial court must utilize in making this evaluation are now well established, i.e.:

1. The court must consider the evidence in the light most favorable to defendants.

2. The court must assume that all conflicts in the evidence were resolved by the jury in favor of the defendants;

3. The court must assume as proven all facts which the defendants' evidence tends to prove;

4. The court must give the defendants the benefit of all favorable inferences which may reasonably be drawn from the facts proven; and

5. The court must deny the motion if, reviewing the evidence in this light, reasonable men could differ as to conclusions to be drawn from the evidence.

Hanson v. Ford Motor Company, 278 F.2d 586, 596 (8th Cir. 1960) (Blackman, J.).

In other words, the plaintiff is not entitled to judgment n.o.v. unless reasonable minds, viewing the evidence in the light most favorable to defendants, could only have found in favor of plaintiff. *Russ v. Ratliff, 538 F.2d 799 (8th Cir. 1976).*

Plaintiff's case was constructed upon a series of events and incidents during the course of his employment and ultimate discharge which he contends were racially motivated discrimination. Defendants countered by evidence tending to establish that the events, incidents and discharge were not discriminatory, in the pure sense, were not racially motivated, in any sense, and were products of legitimate, non-discriminatory business reasons. Fact issues were clearly raised by competent evidence, and this Court is not prepared to rule that, when the assumptions and benefits of the jury verdict are considered, reasonable men could not differ on their resolution.

Plaintiff's motion for judgment n.o.v. must be denied.

V.

NEW TRIAL

Unlike a motion for judgment notwithstanding the verdict, a motion for a new trial is addressed to the sound discretion of the trial court. This exercise of judicial discretion, however, is not a license to freely invoke judicial

whim. An exercise of discretion is a judicial act which is controlled by more or less well-defined standards. *See, B. Cardozo, The Nature of the Judicial Process, (1921)* In exercising the wide latitude reposed, the court is free to evaluate the credibility of witnesses and the weight of the evidence, but it must remain cognizant of the fundamental principle that a court must refrain from anything more than a minimal interference with the fact finding function of a jury. *Cf., Cooper, Directions for Directed Verdicts· A Compass for Federal Courts, 55 Minn. Law. Rev. 903 (1971).* Verdicts can, and should, be set aside, and a new trial granted, only when the verdict is contrary to the clear weight of the evidence to the extent that it constitutes a clear miscarriage of justice. *Simpson v. Skelly Oil Company, 371 F.2d 563 (8th Cir. 1967); Garrison v. United States, 62 F.2d 41 (4th Cir. 1932); Reid v. Maryland Casualty Co., 63 F.2d 10 (5th Cir. 1933).* In making this determination, the trial court is not required to view the evidence in the light most favorable to the prevailing party, *Simpson v. Skelly Oil Co., supra,* and may consider and weigh all factors which are pertinent. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179 (8th Cir. 1972), cert. den. 410 U.S. 930 (1973).* A court must stop short of granting a new trial, however, merely because the jury could have drawn different inferences or conclusions from the evidence, or because another result may appear to the court to be more reasonable. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., supra.* It must be reasonably clear that prejudicial error was committed at trial, or that substantial justice has not been achieved. *See, 11 Wright & Miller, Federal Practice and Procedure §2803, p. 32 (1973).*

The court has reviewed the testimony as reflected in its notes and all exhibits. The ultimate issue in this case was

discrimination *vel non*. The jury was clearly instructed that all that plaintiff had to do was to show that from the evidence that it was more likely than not that illegal discrimination had occurred. The jury's finding was, essentially, to the contrary. This evidence was not contraindicated [sic] by the weight of the evidence to the extent that it even approaches characterization as a clear miscarriage of justice.

Plaintiff's motion for a new trial on his §1981 action must be denied.

VI.

MOTION FOR AMENDED FINDINGS OF FACT

A challenge to a court's findings of fact following a bench trial can be either, (1) that the findings do not inadequately provide a clear understanding of the process by which the court reached its ultimate conclusion, or (2) that the findings are erroneous. *Curtis v. C.I.R., 623 F.2d 1047 (5th Cir. 1980)*. In this case, plaintiff's attack is based solely on the latter alternative. Plaintiff has demonstrated in brief and argument that he fully understands the court's reasoning process. Amplification of the findings is not necessary.

This Court finds no specific direction to the trial courts delineating duties or setting standards governing consideration of a motion for amended findings of fact. One must assume, therefore, that the court must reconsider the factual findings in the light of the objections to them. This entails a review of the evidence, and a determination of whether or not the conclusions which the court originally drew from conflicting factual inferences in the evidence are supported by the weight of the evidence. This is something more than merely resting on an initial determination, and short of permitting relitigation of the case on its merits.

a.

One must also recognize that findings of fact can be influenced by the court's interpretation of the controlling substantive law. *Cf., United States Postal Service v. Aikens, supra.* To clearly present this hurdle to an appellate tribunal, therefore, this Court will state in simple terms the factual elements of the cause of action which this Court felt that plaintiff had to prove to establish liability of a defendant in the Title VII case in somewhat the same way that it reposed in the recesses of this Court's mind when this case was under consideration, the evidence was being reviewed, and the decision drafted. To prevail, plaintiff had the burden of proving by the preponderance, or greater weight, of all of the evidence:

a. that he was discriminated against, i.e., that he was treated differently than other employees occupying similar positions in the corporate structure;

b. that this discrimination was illegal, i.e., that it was purposeful or intentional, and was motivated, at least in part, because of his race.

b.

With that in mind, we can turn to, and attempt to identify, the specific fault which plaintiff finds with the court's findings of fact. Plaintiff's approach was to reiterate each of the events or incidents upon which he presented evidence, and then relate the inferences and conclusions which he draws therefrom. In doing so, however, he omits mention of most of the evidence pertaining to the incident or event which is not favorable to his contention, mistates evidence frequently, and oversteps the bounds of the record on a number of occasions. The court will not attempt to track plaintiff's approach and specifically address each

of the points which he attempts to make. Two will be commented upon for illustrative purposes.

Plaintiff starts with his initial employment by Honeywell Information Systems, and his complaints relating to the change in job title and the lack of a definitive written job description. Although Honeywell Information Systems was not a defendant in the Title VII case, and this evidence was considered only insofar as it could shed light upon events which transpired while he was employed by Honeywell, Inc., plaintiff's treatment of the issue demonstrates his approach. The court, in its findings of fact, stated:

> "This change of title did not affect the salary or duties of the position which plaintiff had accepted, but plaintiff immediately made an issue of this change of title and attributed it to racial prejudice."

Plaintiff does not quarrel with these facts, but, from the evidence as he views it, concludes that:

> "There was evidence that Plaintiff was the only minority in this part of the Corporation. Plaintiff was hired in a fraudulently discriminatory manner for reasons which led one to wonder if plaintiff was hired to meet an EEOC goal and not for the job for which plaintiff was hired."

Plaintiff urges the court to adopt this conclusion and inference. A careful review of the court's notes covering all of the testimony relating to plaintiff's hiring and employment by Honeywell Information Systems confirms the court's original finding that the position for which plaintiff was hired was not misrepresented, that a different job title was created for a rational business reason, that there is no evidence relating to EEOC goals, if such existed, and that the inference plaintiff urges upon the court is sheer speculation.

Plaintiff also dwells upon the acrimony which developed from his unauthorized use of a parking ramp, stating that:

> "COMPLIANCE WITH RULES AND REGULATIONS. There is evidence of only one time that the Plaintiff did not comply with the Company rules and regulations. That was the situation which Mr. Griffin identified as a 'significant event' when the Plaintiff parked his car without permission in the 'parking ramp'. There is evidence that the parking ramp is used by all levels of employees and the assignment is on senority [sic] bases [sic]. The plaintiff parked his car in the ramp without authorization on three occasions to avoid rain. [sic] Mr. Griffin told Plaintiff in a shouting publicly abusive manner to move his car. The Plaintiff testified that he saw other employees parking there in an unauthorized manner. After Mr. Griffin finished shouting at the Plaintiff in Public, [sic] Plaintiff immediately moved his car reported the abusive treatment to the proper authorities. The Plaintiff testified that he never parked his car again in the parking ramp until he received authorization from the corporate authorities."

Plaintiff conveniently makes no reference to his own testimony which established that this seemingly minor incident was blown out of proportion by his conduct after receiving a justifiable direction. Plaintiff forgets that he told his supervisor that he would park his car anywhere he "damned pleased".

The court's finding of fact in this regard was based almost entirely on plaintiff's own testimony. The court's impression is reflected in the findings as follows:

> "The importance of this incident, however, is not the minor infraction of company rules for which plaintiff

was corrected, but the belligerence with which plaintiff received a justifiable reprimand, and his blatant defiance of his superior's directions thereafter. Plaintiff's conduct, and not a strained inference of racial prejudice, is what magnified this minor incident to major proportions."

Plaintiff's comment in his attack on this portion of the court's findings is that:

> "There is no evidence that the parking ramp was used only by senior management nor is there is [sic] any evidence that Plaintiff after instructions from Mr. Griffin ever parked in the parking ramp until authorized by the Company."

Whether spaces on the ramp were assigned to senior management, as the court stated, or on basis of "seniority", as plaintiff contends, is of little import. Plaintiff admittedly was not afforded the privilege, and, contrary to his assertions, testified that on at least one occasion after this emotional eruption he again violated the company rule and parked his car on the ramp.

The conclusion which plaintiff draws from his version of the facts is that:

> "Plaintiff at all times followed the work direction of Mr. Griffin and even followed work direction which was inconsistant from previous work direction The actions and conduct of Mr. Griffin again evidenced an aggressive individual whose tactics were to treat Plaintiff in a disparate discriminstory [sic] manner. Again it should be noted, that all witnesses except for Mr. Griffin stated that the Plaintiff was courteous, friendly, and competent, whereas some witness

[sic] testified that they had difficulty working with Mr. Griffin. Indeed Mr. Griffin left Honeywell because he stated that he in essence had no future in Honeywell. Again it should be noted that Mr. Griffin sworn testimony on the witness stand conflicted with both documented evidence and parts of his deposition taken under oath."

The court is unable to determine the documented evidence to which plaintiff refers, and Griffin's deposition is not in evidence, but the deposition testimony to which plaintiff referred at trial was wholly consistent with Griffin's testimony at trial in regard to this incident. Regardless, the conclusion which plaintiff now urges upon the court is foreign to the finding of fact to which it is directed. It does, however, again demonstrate that plaintiff's problems while at Honeywell were rooted in his ill-concealed dislike for his immediate supervisor, not in racially motivated discriminatory acts.

The court has reviewed all of its notes and all of the documentary evidence introduced at this trial, and carefully considered each and every one of plaintiffs' arguments. None of them have merit. Hindsight indicates that the findings of fact could have been presented in better form, and the law more exhaustively treated. However, the court considers its relation of the findings of fact adequate, and finds that they are supported by the weight of the evidence. One must remember that factual determinations in civil litigation rests upon probability, not certainty. *Virgin Islands Labor Union v. Caribe Const. Co., 343 F. 2d 364 (3d Cir. 1965).* The motion for amended findings of fact will be denied.

NEW TRIAL

This Court recognizes the sensitive nature of discrimination cases. This Court would not hesitate for a moment to grant plaintiff a new trial on the Title VII action if it harbored the slightest reservation in regard to the law which was applied, the factual conclusions which were reached, or if there was any indication that plaintiff possessed new evidence of any substance. As it stands, however, plaintiff has been afforded full opportunity to air his grievances, and to present all evidence that he can muster. The evidence has been carefully weighed in two separate processes, and the applicable law is clear. The court is convinced that plaintiff was treated no differently than any other employee would have been treated in the same or similar circumstances, and that even if some small difference in treatment can be discerned which could be categorized as discriminatory, that difference in treatment was not colored by racial overtones. The court's impression that the reason for plaintiff's problems while employed at Honeywell, which was reached after hearing and observing the witnesses and reading all exhibits, as stated in the Memorandum Decision, remains unchanged. The court is not persuaded that the decision reached is a miscarriage of justice, or that a different result would be reached after another trial.

Plaintiff's motion for a new trial on the cause of action premised on Title VII will be denied.

WHEREFORE, It is—

ORDERED:

That plaintiff's motions shall be, and hereby are, in all respects, denied.

BY THE COURT:

/s/ Patrick J. McNulty
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL CASE NO: #3-81-343
DATE: 10-14-82

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc. et al,

Defendant.

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

MEMORANDUM DECISION & RECOMMENDATION (McNulty-M; 10-8-82) that: 1) Count enter Order that defts Honeywell Info. Systems, Rietti and Ingman be dismissed as defts to claims of pltff; 2) Count V be dismissed without prejudice; 3) Count I be dismissed without prejudice; 4) Count III be dismissed without prejudice; 5) pltff's complaint against John Doe and Mary Roe be dismissed; 6) pltff's motion for relief be granted.

ROBERT E. HESS, CLERK
By /s/ _____
Deputy

STEPHEN M. GOLDFARB
610 Park National Bank Bldg.
5353 Wayzata Blvd.
Mpls., MN 55416

JAMES A. KAEHLER
Honeywell, Inc.
Honeywell Plaza
Mpls., MN 55408

UNITED STATES DISRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., a Delaware Corporation, Honeywell Information Systems, Inc., a Delaware Corporation, Ricardo Rietti, Thomas R. Ingman, Myron E. Amundson, William L. Griffin, James Remington, John Doe and Mary Roe,

Defendants.

SUBSTITUTION OF ATTORNEYS

Civil Action File No. 3-81-343

TO: THE ABOVE - NAMED COURT:

PLEASE TAKE NOTICE, that the undersigned has been substituted as the attorney for Alvin W. Smith in place of Stephen M. Goldfarb, P.A.

Dated: 10/25/, 1982

/s/ Alvin W. Smith
8143 14th Ave. So.
Bloomington, MN 55420
Attorney Pro Se

CONSENT

The undersigned hereby consents to the substitution of Alvin W. Smith, Attorney Pro Se, as the attorney for Alvin W. Smith in the above-entitled proceeding.

Dated: Oct. 25, 1982.

STEPHEN M. GOLDFARB, P A.
/s/ Stephen M. Goldfarb
610 Park National Bank Building
5353 Wayzata Boulevard
Minneapolis, MN 55416
546-8888

PLEASE TAKE NOTICE that the undersigned hereby consents to the above Substitution.

Dated: 10/25, 1982.

/s/ Alvin W. Smith

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., et al,

Defendant.

CIVIL CASE NO: 3-81-343

DATE: 12-9-82

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

ORDER (Devitt - J; 12-7-82) that pltff's mo. to amend complaint is DENIED; and parties' objections to Mag's Memorandum Decision and Recommendation are overruled and the Mag's report is confirmed and the Mag's findings of fact, conclusions of law and recommendations are adopted as those of the Court.

ALVIN W. SMITH
8143 - 14th Avenue S.
Bloomington, MN 55420

DAVID A. GRABHAM
Honeywell, Inc.
Honeywell Plaza
Mpls., MN 55408

ROBERT E. HESS, CLERK
By /s/ _____
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., et al,

Defendant.

CIVIL CASE NO. 3-81-343
DATE: 12-15-82

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

CONSENT TO PROCEED BEFORE U.S. MAGISTRATE WI. APPEAL TO CIRCUIT COURT of Appeals and Order of Reference (Devitt - J) that this action is referred to Mag. McNulty for purpose of conducting all further proceedings and entry of judgment.

ALVIN W. SMITH
8143 - 14th Avenue S.
Bloomington, MN 55420

DAVID A. GRABHAM
Honeywell, Inc.
Honeywell, Plaza
Mpls., 55408

ROBERT E. HESS. CLERK
By /s/ ———————
Deputy

. . . presented in evidence during the course of this trial. Therefore, I feel it is improper to suggest to the jury that damages can be awarded for those elements, and we ask the Court to exclude such instruction from the jury.

THE COURT: The objection is noted.

Any further objection, Mr. Kaehler?

MR. KAEHLER: No further objections, Your Honor, at this time.

THE COURT: Mr. Smith.

MR. OHNSTAD: I'm going to state the objections, Your Honor.

The instructions are acceptable except the plaintiff objects to the instruction that's on Page 30 which deals with the burden of proof of the plaintiff in a 1981 case, and the specific objection is that the instruction states that the plaintiff has the burden of proving by preponderance of the evidence that the defendant had a racially discriminatory purpose or motive and it also states and we object to the statement as well, that it is not sufficient for the plaintiff to simply show that the plaintiff is black and that the plaintiff was treated differently.

THE COURT: The objection is noted.